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## **Party autonomy, inconsistency and the specific characteristics of family law in the EU**

Lara Walker\*

Party autonomy is becoming more prevalent in substantive family law, and therefore private international law should find a method of incorporating party autonomy into family law. This should be done in a way that takes account of the specific characteristics of family life. Currently the EU Regulations take a disjointed and incoherent approach to party autonomy in family law, and do not consider specific issues relating to the family. There is no clear explanation of why this is and it appears to be related to the fragmented development of the EU family law instruments. This inconsistency is not only apparent across the instruments but also within the instruments, suggesting that the discrepancies are not context-specific. This article argues that it is possible to have a consistent approach to party autonomy across all areas of family law while catering for family specific issues. A consistent approach will allow families to resolve their disputes within one legal system, rather than the more complicated situation which confronts some families due to the fragmentation of jurisdiction required by the current legal rules.

**Keywords:** choice of court agreements in family cases; choice of law; EU law; protection of weaker parties; joint party autonomy.

### **A. Introduction**

The regulation of party autonomy in family law is inconsistent in the EU, both across and within instruments.<sup>1</sup> It is unclear why party autonomy is not provided for in each circumstance. The restrictions on party autonomy, combined with the various default rules, could mean that on the

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<sup>1</sup> The relevant instruments for the purpose of this article are: Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 [2003] OJ L338 (Brussels IIa); Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1 (Maintenance Regulation); Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L343/10 (Rome III); Council Regulation (EU) No 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (Matrimonial Property Regulation).

breakdown of a marriage different courts have jurisdiction for divorce, parental responsibility and maintenance, and different laws could be applicable to each of these issues. Different courts may even have jurisdiction for child support and adult maintenance.<sup>2</sup> This lack of consistency could create difficulties for families on relationship breakdown, as finances are likely to be limited and it may not be helpful for families to have to deal with more than one court (and applicable law) in different jurisdictions.<sup>3</sup> This also creates problems for national courts, as national laws vary considerably across the EU, with some courts only being able to issue a divorce if the ancillary issues have been dealt with.<sup>4</sup> The supremacy of EU law means that the EU law rules should prevail,<sup>5</sup> but this will create complications for judges where the national requirements conflict with the EU rules on jurisdiction.<sup>6</sup> In other jurisdictions the issues are already partially separated in national proceedings.<sup>7</sup> While a procedural split under national systems may not affect the parties (to a huge extent), ongoing proceedings in different Member States could be problematic for litigants and lead to extra costs. It could also result in double payments being awarded if particular issues are characterised in different ways in different countries.

This article seeks to provide a solution to this fragmentation in the context of party autonomy. It argues that allowing parties to designate a court to deal with all elements of their dispute should prevent inconsistency in cases where parties can agree on a jurisdiction. The approach adopted by this paper supports joint party autonomy, requiring both parties to agree, rather than individual party autonomy. This is to reflect the interdependence of family relationships.<sup>8</sup> A consistent and appropriate approach to party autonomy could make the resolution of these disputes simpler for families on relationship breakdown. Identifying an appropriate approach to party autonomy gives rise to a number of questions however, such as whether the designated court should have a connection to the dispute, the point in time when it is possible to designate the court and whether

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<sup>2</sup> Case C-184/14 *A v B*, EU:C:2015:479.

<sup>3</sup> L Walker, “New (and old) Problems for Maintenance Creditors under the Maintenance Regulation” in P Beaumont et al (eds) *Cross-Border Litigation in Europe* (Hart, 2017) 771.

<sup>4</sup> MPI Luxembourg, Planning the Future of Cross-Border Families: A path through co-ordination (2017), <http://www.eufams.unimi.it/wp-content/uploads/2017/06/Report-on-Internationally-Shared-Good-Practices-v2.pdf>, accessed 1 February 2018.

<sup>5</sup> Case C- 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, EU:C:1963:1

<sup>6</sup> On this particular issue see Case C-604/17, *PM v AH* EU:C:2018:10, where the CJEU emphasised that the EU rules must prevail.

<sup>7</sup> J Munby, “18th view from the President's Chambers: the on-going process of reform - financial remedies courts” (2018) 48 *Family Law* 156, which discusses the further de-linking of family proceedings in England and Wales.

<sup>8</sup> See section D.

it is appropriate for parties to designate a court to deal with all family law issues when these issues may have a significantly different purpose. The article will consider these questions in relation to the specific characteristics of families, rather than factors from the commercial sector.

Firstly, section B will consider the current rules and set out the current position. Secondly, section C will consider whether there is a policy reason behind these rules in the context of party autonomy. Thirdly, section D will then consider the specific characteristics of family law in order to determine in which circumstances party autonomy is suitable and fourthly, section E will propose an approach based on these considerations.

## **B. The EU system**

This section will demonstrate that the rules on jurisdiction and applicable law under Brussels IIa, the Maintenance Regulation, Rome III, The Hague Maintenance Protocol,<sup>9</sup> and the Matrimonial Property Regulation are inconsistent and could lead to cases being heard in multiple jurisdictions, and the application of conflicting laws, in related proceedings. It will also show that each instrument takes a different approach to party autonomy. In less complicated cases the likelihood of multiple courts having jurisdiction will be lower, but parties may still be prevented from selecting the court of their choice because of the restrictions in relation to party autonomy.

Party autonomy arises in various guises throughout the instruments, and the instruments give differing importance to party autonomy. The instruments often aim to promote individual party autonomy by providing several jurisdictional bases, however in some cases there is little room for joint party autonomy which supports the parties working together to come up with an effective choice. If individual autonomy is privileged then this can operate in a manner which disadvantages structurally weaker parties.<sup>10</sup> Therefore the law should focus on joint party autonomy, in order to take account of the interdependence of family lives. This approach is supported by literature on relational autonomy.<sup>11</sup> This article will analyse why this approach to autonomy is important at

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<sup>9</sup> The Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations (Hague Protocol) which binds all Member States, with the exception of the UK and Denmark, through EU approval.

<sup>10</sup> M Friedman, "Autonomy, social disruption and women" in C MacKenzie and N Stoljar (eds) *Relational Autonomy* (OUP, 2000) 35. Friedman is referring specifically to women.

<sup>11</sup> See J Herring, *Relational Autonomy and Family Law* (Springer, 2014). See also J Nedelsky *Law's Relations* (OUP, 2012).

section D, by considering the specific characteristics of family law such as dependency and caring. Firstly the article will consider the different rules within the EU system to highlight the difficulties with the current approach.

### **1. *Brussels IIa – divorce and parental responsibility***

Brussels IIa includes rules for jurisdiction in relation to divorce and parental responsibility. In the context of divorce the Regulation does not support joint party autonomy because parties cannot designate a court to deal with their divorce under Brussels IIa. Instead the instrument purports to promote party autonomy by offering multiple jurisdictional bases allowing the applicant to choose the court. This approach focuses on individual party autonomy, rather than joint party autonomy. Although the parties can discuss who should be the applicant and decide which court should have jurisdiction, it would be better if the Regulation supported joint party autonomy officially. Instead the focus on individual autonomy and the operation of the *lis pendens* provisions can encourage a rush to court which does not support alternative dispute resolution (ADR).<sup>12</sup> This approach is not consistent with the approach in the Maintenance Regulation and the Matrimonial Property Regulation.<sup>13</sup> There is one exception in Brussels IIa which provides a solution for joint applications.<sup>14</sup> This allows parties making a joint application to jointly choose a court in the State of one of the parties' habitual residence at the time the application is made, but this provision can only apply where at least one of the parties is habitually resident in a Member State that allows parties to make joint applications for divorce.<sup>15</sup> The EU Commission did not propose any changes to divorce jurisdiction in their Brussels IIa recast proposal.<sup>16</sup> However, substantive amendments can be made to provisions which remain unchanged in the Commission's Proposal where this

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<sup>12</sup> See for example M Ní Shúilleabháin, "Ten Years of European Family Law: Retrospective reflections from a common law perspective" (2010) 59 *International and Comparative Law Quarterly* 1021.

<sup>13</sup> Discussed below at B, 2 and 3. In contrast, Brussels I allows the parties to designate a court prior to the dispute (when they are in agreement) and this cannot be departed from by one party unilaterally seising another court, unless the defendant submits (Brussels I Recast Arts 25, 31 and 26).

<sup>14</sup> Art 3, indent 4.

<sup>15</sup> For an alternative view see M Ní Shúilleabháin, *Cross-Border Divorce Law: Brussels II bis* (OUP, 2010) para 4.09, arguing however that the alternative view provides the same solution as indent 3.

<sup>16</sup> "The proposal does not contain any changes with regard to the scope and the matrimonial matters for which the status quo is retained. This means that Chapter I (with the exception of mere clarification in definitions) and Chapter II Section 1 (except for clarification of Articles 6 and 7) remain unchanged. As a consequence, spouses in an international marriage will continue to have a possibility to consolidate the different proceedings as foreseen in the Regulation and other family law instruments (such as the Maintenance Regulation)." (Brussels 30 June 2016, COM (2016) 411 final).

appears necessary.<sup>17</sup> These amendments should be made in accordance with the procedure laid down by the Treaty.<sup>18</sup> The problem with this provision is that it does not clarify which institution should determine whether changes are necessary. It is arguable this would be the Council because the Commission has already decided that changes are not necessary, and this is why the provision remains unchanged in the Proposal.<sup>19</sup> Unfortunately point 8 does not give a decisive answer, therefore, if there were ever a dispute between the Council and the Commission it is likely that the Court of Justice of the European Union (CJEU) would need to make a decision on this issue. This dispute has not arisen in these negotiations,<sup>20</sup> so a change to divorce jurisdiction is extremely unlikely in the short-term.

In contrast Brussels IIa does allow parties to choose a court to hear parental responsibility proceedings. The relevant parties can prorogate the divorce court,<sup>21</sup> by expressly, or otherwise unequivocally, accepting the jurisdiction of the court.<sup>22</sup> The provision only allows the parties to choose the court at the time the proceedings take place, no prior choice of court agreement is permitted. This ensures that the parties agree to this jurisdiction at the time of the proceedings.<sup>23</sup> In cases where there are no divorce proceedings, parties may prorogate an alternative court

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<sup>17</sup> Interinstitutional Agreement of 28 November 2001 on a more structured use of the recast procedure [2002] OJ C 77/01, Point 8. Interinstitutional Agreement of 13 April 2016 between the European Parliament, the Council of the European Union and the European Commission on better law making [2016] OJ L 123/1, reaffirms the 2001 agreement and requires the Commission to submit a proposal where recasting is not appropriate (Point 46). This provision also refers to the Interinstitutional Agreement of 20 December 1994 on the Accelerated working method for official codification of legislative texts [1996] OJ C 102/02. This document relates primarily to codification rather than recasting (see Point 1 for the distinction). Where there is a simple codification, then the Council cannot review the substantive text (Point 6), but where it is necessary to go beyond simple codification a different procedure is required.

<sup>18</sup> Interinstitutional Agreement of 28 November 2001 on a more structured use of the recast procedure [2002] OJ C 77/01, Point 8. The relevant Treaty provisions are Arts 81(3) and 293 Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU).

<sup>19</sup> The special legislative procedure applies in this area and it is the Council that should establish measures (Art 81(3) TFEU) upon proposal by the Commission which is the body that should submit the proposal (Art 81(3), and see Point 8 of the 1994 Interinstitutional Agreement (n 14)). The Commission can alter the proposal at any stage during the procedure as long as the Council has not acted (Art 293 TFEU).

<sup>20</sup> See <http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-matrimonial-matters-matters-of-parental-responsibility-%E2%80%93-brussels-ii-a-revision> accessed 20 March 2018, and Commission responses to text adopted in Plenary SP (2018) 83, available at [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2016/0190\(CNS\)#tab-0](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2016/0190(CNS)#tab-0), accessed 28 March 2018.

<sup>21</sup> Under Art 12(1) this is the spouses and any other holders of parental responsibility.

<sup>22</sup> Art 12(1). If the conditions are not met, then the courts in the State of the child's habitual residence have jurisdiction (*PM v AH*, *supra* n 6, paras 28-30).

<sup>23</sup> Compare with the approach discussed in section B, 2.

provided that the child has a substantial connection with that Member State.<sup>24</sup> It should be noted that Article 12(1) and (3) differ on the point of which parties should accept the prorogation. Article 12(1) specifies that this should be the spouses and (where relevant) other holders of parental responsibility, whereas Article 12(3) requires the acceptance of “all the parties to the proceedings.”<sup>25</sup> In *Saponaro* the Court of Justice (CJEU) held that “all parties” would include a prosecutor who was automatically joined as a party to the proceedings.<sup>26</sup> In cases where the prosecutor opposes the jurisdiction then it will not have been accepted by all parties.<sup>27</sup> This is a strict interpretation of the text of the Regulation, which appears to limit autonomy. However, it is likely that the prosecutor would only oppose the prorogation if they had a good reason to do so. For example, they might oppose the prorogation because it is not in the best interests of the child. Under both Article 12(1) and (3) the court must consider that the prorogation is in the best interests of the child,<sup>28</sup> in order for the jurisdiction to be established. The rule on prorogation departs from the general rule whereby jurisdiction is to be established on the basis of the child’s habitual residence,<sup>29</sup> by virtue of this jurisdiction’s proximity to the child.<sup>30</sup>

Brussels IIa does not permit formal choice of court agreements for divorce, but parties can designate a court for parental responsibility. Therefore jurisdiction for parental responsibility can be aligned with divorce jurisdiction, which could make the proceedings slightly simpler, at least they will all take place in the same Member State. The jurisdiction must be accepted unequivocally in order for the jurisdiction to be established, and this must happen at the time the court is seised.<sup>31</sup> This would mean at the time that the documents initiating the proceedings are lodged with the court or served, whichever has to happen first.<sup>32</sup> In court-based proceedings the question of whether there is unequivocal acceptance usually cannot be tested until the proceedings are

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<sup>24</sup> Art 12(3).

<sup>25</sup> The Commission did not suggest a change to this wording in the Recast proposal (COM (2016) 411 final). In the Proposal this provision is Art 10(3) and there is a new para 5 which also refers to “all the parties”. The Parliament did not make any comments on this point in their unbinding decision (T8-0017/2018), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2018-0017> accessed 18 May 2018.

<sup>26</sup> Case C-565/16, *Saponaro v Xylina*, ECLI:EU:C:2018:265, para 32.

<sup>27</sup> *Ibid.*

<sup>28</sup> Art 12 and see *Saponaro v Xylina*, *ibid*, paras 33-40.

<sup>29</sup> Art 8.

<sup>30</sup> Case C-497/10 PPU *Mercredi v Chaffe*, EU:C:2010:829; *A v B*, *supra* n 2.

<sup>31</sup> Case C-656/13, *L v M*, EU:C:2014:2364.

<sup>32</sup> Art 16, and see *L v M*, *ibid*, para 56.

underway, where the proceedings are initiated by one party.<sup>33</sup> Where the parties make a joint application to the same court this will be evidence of unequivocal acceptance, unless there are other factors which contradict that finding.<sup>34</sup> It is also important to note that the prorogation is only for the purpose of the specific proceedings and ends when those proceedings come to an end and a decision is given.<sup>35</sup> This is because the assessment of the best interests of the child should only be made in regard to those proceedings at the relevant time, it cannot be argued that the indefinite jurisdiction of the court will be in the child's best interests,<sup>36</sup> nor that that is the intention of the parents.<sup>37</sup>

The other exception to the general rule in Article 8 (which focuses on habitual residence) is transfer.<sup>38</sup> The transfer provision also allows for party autonomy as one party, or all parties, can request that the case is transferred to a court of another Member State. The judge can make the transfer if this is in the best interests of the child.<sup>39</sup> However, this provision does not necessarily ensure joint party autonomy because the transfer can be made where this is only requested (or accepted) by one of the parties.<sup>40</sup>

## **2. Maintenance Regulation**

The Maintenance Regulation applies to disputes involving maintenance. It incorporates a number of different jurisdictional bases and includes a provision on choice of court agreements. Under the Maintenance Regulation adults can make a choice of court agreement,<sup>41</sup> but choice of court agreements are precluded for maintenance disputes involving children under the age of 18.<sup>42</sup> This distinction was not made in the previous system under Brussels I, whereby a choice of court

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<sup>33</sup> For further analysis see section E, 2 below.

<sup>34</sup> *Saponaro v Xylina*, *supra* n 26, para 25.

<sup>35</sup> Case C-436/13, *E v B*, EU:C:2014:2246, paras 39-40 and 49; *L v M*, *supra* n 31; Case C-499/15 *W and V v X*, EU:C:2017:118. This corresponds with the intention of the drafters that once the decision has become final and no further appeal or review of any kind is possible then Art 3 (now Art 12) will no longer apply. (Borrás Report, para 39).

<sup>36</sup> *E v B*, *ibid*, paras 46-47.

<sup>37</sup> *Ibid*, para 48.

<sup>38</sup> Art 15.

<sup>39</sup> Case C-428/15, *Child and Family Agency v J. D.*, EU:C:2016:819. For an example of private law proceedings involving transfer see *Re M (Children)* [2016] EWHC 2535 (Fam). For an analysis of the EU provisions on transfer compared to the provisions in the 1996 Convention see P Beaumont, "Private International Law concerning children in the UK after Brexit: comparing Hague Treaty law with EU Regulations" (2017) 29 *Child and Family Law Quarterly* 213, 217-222.

<sup>40</sup> See Art 15(2).

<sup>41</sup> Art 4.

<sup>42</sup> Art 4(3).



agreement could apply to child maintenance and the parties were able to choose any court. The Maintenance Regulation limits the choice of court agreement to the court of a Member State where any party is habitually resident, or any party has their nationality or domicile. The parties can also designate the court that has jurisdiction to settle their disputes in matrimonial matters, or the court of the Member State where the spouses had their last common habitual residence, provided they shared that habitual residence for at least a year.<sup>43</sup> Prima facie these requirements ensure that there is a connection between the parties and the dispute, however the conditions can be met either at the time the agreement is concluded or at the time the court is seised.<sup>44</sup> If the choice of court agreement relates to the habitual residence of one (or both) spouse(s) at the time the agreement was concluded, this jurisdiction may have a very limited connection to the parties and their dispute at the time it is litigated.<sup>45</sup> The other distinction to be made from Article 12 Brussels IIa is that a choice of court agreement made under the Maintenance Regulation can continue indefinitely and is not solely for the purpose of a particular proceeding. This is designed to create certainty and it can uphold joint party autonomy.<sup>46</sup> However, if one party changes their mind the agreement will remain unless both parties decide it should no longer be valid, and jointly decide to designate an alternative court. Where only one party considers that the agreement should remain valid the ability of that party to rely on the agreement at the time of the proceedings promotes individual rather than joint party autonomy at the time of the dispute.<sup>47</sup>

The Regulation also supports party autonomy more broadly by offering a number of alternative fora. One of the aims of the Maintenance Regulation is to protect the creditor as the “weaker” party, therefore the grounds of jurisdiction are arguably creditor-focused.<sup>48</sup> However, it is

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<sup>43</sup> Art 4(1).

<sup>44</sup> Art 4(1).

<sup>45</sup> In contrast Art 4(1)(b) relies on more permanent connecting factors, such as nationality which could be linked to cultural identity, see F Mautzsch, “Party autonomy in European private international law: uniform principle or context-dependent instrument” (2016) 12 *Journal of Private International Law* 466, 478.

<sup>46</sup> In other contexts this drive for legal certainty has been described as an approach based on an ethic of justice rather than an ethic of care. The problem with an approach based on an ethic of justice is it cannot cater for change despite the fact that conditions will change, particularly in relation to intimate life. See Herring, *supra* n 11, 36-37, and section D below.

<sup>47</sup> A choice of court agreement is treated equally to the alternative rules in Arts 3-5. Where the parties no longer agree priority would be given to the court first seised (Art 12). If the court with jurisdiction under the choice of court agreement is seised first, that court will automatically have jurisdiction regardless of the fact that the other party no longer wants to be held to the choice of court agreement and the court second seised is a more appropriate court.

<sup>48</sup> Art 3, and see G Rühl, “The Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy” (2014) 10 *Journal of Private International Law* 335.

questionable whether the Regulation is as creditor-focused as some commentators and practitioners believe. One departure is the provision on submission.<sup>49</sup> This provision applies regardless of the age of the parties, allows the applicant to seise an unconnected court and does not require the defendant to be aware of the effects of submission before jurisdiction is established.<sup>50</sup> Because the defendant does not have to be aware of the effects of their submission, and the applicant can independently choose to seise the court, then this provision can promote individual party autonomy rather than joint party autonomy. This wide submission provision does not fit with the overall aim of the instrument. It is unclear why it was necessary to exclude children from the choice of court provision, when jurisdiction can be found for child maintenance in an unconnected court of solely the debtor's choice because a creditor has unwittingly submitted to the jurisdiction.<sup>51</sup> In particular, a debtor can sidestep the rule which is intended to limit jurisdiction in modification proceedings by utilising the submission provision.<sup>52</sup>

In situations where there is no choice of court agreement and no submission, the Maintenance Regulation upholds individual party autonomy by allowing parties to seise the court which has jurisdiction for related proceedings as an alternative forum.<sup>53</sup> However in the context of related proceedings the Regulation distinguishes between child maintenance and adult maintenance, providing that the court which has jurisdiction for proceedings on status can hear maintenance claims which are ancillary to these proceedings,<sup>54</sup> and the court which has jurisdiction for proceedings on parental responsibility, can hear maintenance claims which are ancillary to the parental responsibility proceedings.<sup>55</sup> In this context, the CJEU has held that where the provisions on related proceedings point to different courts; child maintenance should only be considered as related to the parental responsibility proceedings and not to the divorce proceedings.<sup>56</sup> This is because the court of the child's habitual residence is the preferred jurisdiction for disputes involving children on the basis of proximity to the child.<sup>57</sup> By taking this approach the EU links child support to parental responsibility, rather than to financial arrangements. Therefore the result

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<sup>49</sup> Art 5.

<sup>50</sup> In contrast see Art 26 Brussels Ia and Art 8 Matrimonial Property Regulation.

<sup>51</sup> See Walker, *supra* n 3.

<sup>52</sup> Art 8(2)(b).

<sup>53</sup> Art 3(c) and (d).

<sup>54</sup> Art 3(c).

<sup>55</sup> Art 3(d).

<sup>56</sup> *A v B*, *supra* n 2.

<sup>57</sup> *Ibid.*

of this is that the court of the child's habitual residence will most likely always hear the child maintenance dispute, even if Article 3(d) is used, unless there has been prorogation or transfer under Brussels IIa.

It is possible for parties to create coordination and ensure that one court deals with all the proceedings, however this cannot be done by designating a court through a choice of court agreement. Instead the parties would have to work together to ensure that the correct court is seised and that the parties are not rushing to seise alternative courts. The starting point would be the divorce court,<sup>58</sup> the parties would then have to prorogate that court for parental responsibility.<sup>59</sup> Providing that the judge agrees that the prorogation is in the best interests of the child, then that court could also have jurisdiction for both adult and child maintenance.<sup>60</sup> In the context of parental responsibility the prorogated court would only have jurisdiction for those proceedings and then jurisdiction would revert back to the court of the child's habitual residence for any modification proceedings, unless the parents prorogued a court again for a change to the parental responsibility decision, or requested a transfer. In the case of maintenance, the limits on debtors in modification proceedings would not apply where the creditor was not habitually resident in the State where the proceedings were brought.<sup>61</sup>

### ***3. Enhanced cooperation and relevant Hague instruments***

This article mainly focuses on jurisdiction, in divorce, parental responsibility and maintenance.<sup>62</sup> Nevertheless, it is important to take account of the Matrimonial Property Regulation and other relevant instruments including applicable law rules,<sup>63</sup> particularly in relation to party autonomy, to determine how these rules relate to jurisdiction. These instruments (with the exception of the

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<sup>58</sup> However, it may be the case that the court available under Art 3 Brussels IIa is not particularly suitable in any event, indicating the need for parties to be able to designate an alternative forum. For example, a couple who were habitually resident in Portugal for a number of years moved to Spain. This resulted in the breakdown of their relationship. They want to apply for divorce in Portugal, but they are now unable to do so.

<sup>59</sup> Art 12(1).

<sup>60</sup> Art 3(c) and (d), and see section B, 4.

<sup>61</sup> Art 8.

<sup>62</sup> The Maintenance Regulation applies in all Member States, with special rules in relation to Denmark. The Maintenance Regulation applies in Denmark to the extent that it amends Regulation no 44/2001 (OJ L 149/80). Brussels IIa applies in all Member States apart from Denmark.

<sup>63</sup> Rome III, Matrimonial Property Regulation (which covers both jurisdiction and applicable law), the Hague Protocol and the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996 Convention), which applies in all Member States.

1996 Convention) do not apply in all Member States, so a choice of jurisdiction will indeed affect applicable law, depending on whether that jurisdiction applies harmonised rules on applicable law in a particular area or the *lex fori*.

(a) *Divorce, Rome III*

Rome III was finalised through enhanced cooperation and only applies in some Member States.<sup>64</sup> The available laws under Rome III, for choice of law, are the law of the habitual residence or former habitual residence of *both* spouses at the time the agreement is concluded, the law of the nationality of one of the spouses or the law of the forum.<sup>65</sup> This could be used by parties to avoid a restrictive divorce law, where they have previously lived abroad in a country with a more liberal divorce regime.<sup>66</sup> The agreement can be concluded at any time and varied up until the court is seised.<sup>67</sup> However, where parties seise a forum that allows designation of the *lex fori* during the proceedings then they can select this law, in accordance with the law of the forum.<sup>68</sup> There does not appear to be any clear default rule,<sup>69</sup> apart from the fact that choice of law is given preference.<sup>70</sup> It is also clear that the rules do not always correspond with those in Article 3 Brussels IIa, so there is no guarantee that the *lex fori* will apply.<sup>71</sup> In some cases this could benefit the parties, eg if they feel particularly close to the law of a previous habitual residence. In other cases, however, this may confuse parties if they expect their divorce to be dealt with in accordance with the law of the State where they made their application. It may also increase the costs of litigation if a party has to prove a foreign law.

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<sup>64</sup> Rome III applies in: Austria, Belgium, Bulgaria, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain. The Regulation also applies in Estonia as of February 2018, [https://e-justice.europa.eu/content\\_law\\_applicable\\_to\\_divorce\\_and\\_legal\\_separation-356-en.do?clang=en](https://e-justice.europa.eu/content_law_applicable_to_divorce_and_legal_separation-356-en.do?clang=en), accessed 18 May 2018.

<sup>65</sup> Art 5(1).

<sup>66</sup> For example, an Italian wife sought a divorce in Italy and this was granted without the need for legal separation by court decree as the parties had agreed that the law of Pennsylvania (the parties' former habitual residence) should apply to the divorce. Public policy did not apply (see K Siehr: "Marry in haste, repent at leisure. International Jurisdiction and Choice of the Applicable Law for Divorce of a Mixed Italian-American Marriage" (2017) *IPRax*, 411).

<sup>67</sup> Art 5(2).

<sup>68</sup> Art 5(3).

<sup>69</sup> This is in contrast to the Hague Protocol discussed *infra*.

<sup>70</sup> This is equivalent to Rome I, where the alternative rules only apply in the absence of choice. This can be distinguished from the rules in the Hague Protocol.

<sup>71</sup> For example, the rules in Brussels IIa can operate on the basis of either spouse's habitual residence but a choice under Rome III requires a common habitual residence, whereas the opposite is the case in relation to nationality.

*(b) Parental Responsibility, 1996 Convention*

There is no choice of law provision under the 1996 Hague Convention. The general rule is that the law of the forum will apply,<sup>72</sup> which will normally be the law of the child's habitual residence.<sup>73</sup> In exceptional circumstances the court may apply, or take into consideration, the law of another State which has a substantial connection to the situation, in order to protect the person or the property of the child.<sup>74</sup> There are special rules for the attribution and the extinction of parental responsibility without the intervention of a judicial or administrative authority, in which case the law of the habitual residence of the child applies.<sup>75</sup> Whether the parties have chosen a court, using Article 12 Brussels IIa, or the court of the child's habitual residence has jurisdiction the law of the forum will usually apply to "custody" and "access".

*(c) Hague Protocol, Maintenance and child support*

There are two provisions on choice of law within the Hague Protocol. Article 7 allows parties to designate the law of the court seised for the purpose of a particular dispute only.<sup>76</sup> This provision applies to all types of maintenance obligations. Article 8 allows a wider choice, this choice can be made at any point in time and can continue to apply beyond a particular dispute. The provision allows parties to select the law of the habitual residence or nationality of either of the parties at the time of designation.<sup>77</sup> The parties can also designate the law that they have chosen to apply to their matrimonial property or divorce, or the law that in fact applies to either of these issues.<sup>78</sup> However, unlike Rome III this choice is not automatically given preference. A judge can set the agreement aside if the parties were not fully aware of the consequences of their choice at the time of the designation. In addition, if the result is that the creditor loses their right to maintenance then this has to be considered in relation to the law of their habitual residence at the time of the designation. Under Article 8 the parties cannot make a choice in relation to children under 18 years. If the parties do not plead that there is a choice of law, the default rule in the Protocol normally results

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<sup>72</sup> Art 15. The general rule is that this excludes national conflict rules (Art 21).

<sup>73</sup> Lagarde Report, para 86.

<sup>74</sup> Art 15(2).

<sup>75</sup> Art 16 and see Lagarde Report, paras 93-110.

<sup>76</sup> Art 7. This is similar to the process in Art 12 Brussels IIa, where the court is only seised for the purpose of those particular proceedings.

<sup>77</sup> Art 8(1)(a) and (b).

<sup>78</sup> Art 8(1)(c) and (d).

in the application of the *lex fori*.<sup>79</sup> This is because the general rule is that the law of the habitual residence of the creditor shall apply.<sup>80</sup> This would then coincide with jurisdiction which is also creditor-based. However, if the creditor chooses to sue in the debtor's habitual residence then this rule is reversed (in certain circumstances) and the law of the habitual residence of the debtor applies.<sup>81</sup> In a case where the creditor cannot claim maintenance under the otherwise applicable law then the law of the forum will apply.<sup>82</sup> Therefore the combined effect of these rules results in the application of the *lex fori* in many cases. One point of departure is where the parties have brought divorce proceedings in the country of their common nationality (France), which is different from their country of habitual residence (Belgium), and then used Article 12(1) BIIa, and Articles 3(c) and (d) of the Maintenance Regulation for all proceedings to be heard in one court. Another point of departure is where an unconnected court is designated using Article 5 of the Maintenance Regulation. In both examples, the law of the forum will only apply to the maintenance dispute where the parties make use of Article 7.<sup>83</sup>

#### *(d) Matrimonial Property*

Like Rome III, the Matrimonial Property Regulation was also finalised through the system of enhanced cooperation.<sup>84</sup> The rules on matrimonial property form the most complicated regime in

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<sup>79</sup> See L Walker, *Maintenance and Child Support in Private International Law* (Hart, 2015) ch 6.

<sup>80</sup> Art 3.

<sup>81</sup> Art 4(1).

<sup>82</sup> Art 4(2). Logically, this only applies to maintenance which is payable at the time the court is seised. If a creditor attempts to make a maintenance claim in relation to an earlier period, then they can only make this claim under a law that would have applied at the time of the claim (Case C-83/17, *KP v LO*, EU:C:2018:408, see in particular paras 46-50). If no maintenance would have been payable under the law that would have applied at the time the original claim relates to, then the creditor cannot make a retrospective claim on the basis that the law of their new habitual residence would have allowed a claim. They can make a new claim in relation to the current period, if relevant.

<sup>83</sup> They could use Art 8 for adult maintenance, but not for child maintenance.

<sup>84</sup> Council Decision (EU) 2016/954 of 9 June 2016 authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships. The countries which are party to the resulting Regulations are: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain and Sweden. This paper focusses on the Matrimonial Property Regulation (n1) and not its accompanying Regulation which focusses on the property consequences of registered partnerships (Council Regulation (EU) 2016/1104 of 24 June 2016 implementing the enhanced cooperation in areas of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships). This is justified on the basis that Brussels IIa does not appear to cover the dissolution of registered partnerships, at least this can be derived from the different approach taken in Art 5 of each Property Regulation (further discussion on this matter is outside the scope of this article).

a bid to try and establish some coherence with earlier regimes.<sup>85</sup> The Matrimonial Property Regulation seeks to ensure coherence with jurisdiction (and law) for divorce, where the rules deem the earlier Regulations correct. It will be explained below that co-ordination of jurisdiction is only automatic in relation to certain jurisdictional grounds. Where there is not automatic co-ordination it appears that there is a perceived problem with the earlier Regulations and therefore co-ordination is not automatic for these grounds. The other grounds require that additional measures are taken in order for there to be co-ordination, despite the fact that the rules of jurisdiction that are departed from are treated equally within Article 3 Brussels IIa.<sup>86</sup>

The starting point is that the court seised for divorce shall have jurisdiction to rule on matters of matrimonial property arising in connection with the divorce application.<sup>87</sup> However, this is insufficient where the jurisdiction is based on indent 5 or 6 of Article 3(1)(a),<sup>88</sup> or Article 5 or Article 7,<sup>89</sup> Brussels IIa. In these cases the agreement of the spouses is also required in order for the court to have jurisdiction for matrimonial property matters.<sup>90</sup> This implies that these provisions are not as acceptable as Article 3(1)(a) indents 1-4, Brussels IIa, regardless of the fact that all of the provisions in Article 3 are given equal weight under Brussels IIa.<sup>91</sup> Where an agreement is required and parties do not agree, then there are default rules in Article 6 which are subject to a choice of court provision in Article 7 of the Matrimonial Property Regulation. The choice of court provision allows parties to designate the courts in the State where the marriage was celebrated, or to designate a court in accordance with the applicable law provisions in Article 22. It is important to note that in cases where Article 5(1) applies (so divorce jurisdiction is based on indent 1-4 Article 3(1)(a) Brussels IIa) parties cannot make use of Article 7. Instead they must use the jurisdiction designated by Article 5 regardless of the fact that this court was not necessarily chosen by the parties, and one party may not be accepting of the divorce jurisdiction chosen unilaterally

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<sup>85</sup> For example, the Matrimonial Property Regulation seeks to establish coherence with both Brussels IIa and the Succession Regulation, depending on which area the dispute is connected to. See Arts 4 and 5 and Recitals 33-35.

<sup>86</sup> Art 3 Brussels IIa, and see section B, 1.

<sup>87</sup> Art 5(1).

<sup>88</sup> These provisions are both based on a new habitual residence of the applicant, where they must have resided for one year or six months (if they are also a national of that State) prior to the commencement of divorce proceedings.

<sup>89</sup> Art 5 relates to the conversion of a legal separation into divorce and Art 7 is residual jurisdiction. There is also Art 4 which allows counterclaims to be made in the court with jurisdiction for the main claim.

<sup>90</sup> Art 5(2) Matrimonial Property Regulation.

<sup>91</sup> Art 7 Brussels IIa is a default provision that can only apply when the other provisions do not, and Art 5 Brussels IIa applies without prejudice to Art 3.

by the applicant.<sup>92</sup> The Matrimonial Property Regulation does, however, include a provision on submission.<sup>93</sup> Unlike the Maintenance Regulation, this includes the safeguard that parties must be aware of the consequences of their actions before this can take effect, so that parties cannot blindly submit. Therefore, if parties can agree on a court that is not the divorce court, then they could work together and use the submission provision to subvert the effects of Article 5(1). This supports joint party autonomy, more than individual party autonomy, because of the proviso that the defendant must be aware of their actions.<sup>94</sup> This information allows the defendant to decide whether or not to accept the jurisdiction of the court. In order for this to work, however, the parties would have to be able to make sense of these complicated legal provisions.

The Regulation allows parties to designate an applicable law and change the law designated.<sup>95</sup> However the Regulation restricts which laws the parties can choose from. Parties can designate the law of the State where both or one of the parties is habitually resident, or the law of the nationality of either party, at the time the agreement is concluded.<sup>96</sup> The parties are free to alter the agreement at any time to take account of any changes in their living arrangements, however any change will only have prospective effect (unless otherwise decided).<sup>97</sup> This is followed by detailed provisions on formal and material validity, for both choice of law clauses and substantive property agreements.<sup>98</sup>

The law applicable in the absence of choice is complicated and will not necessarily coincide with the jurisdictional provisions contained in the same Regulation. For example, the provision refers to the common habitual residence or common nationality of the spouses directly after the time of the marriage.<sup>99</sup> If the spouses have moved States often since they were first married, or spent a very short time in this first habitual residence, they will have relatively little connection to this law at the time of the divorce and it will not be linked to the jurisdiction, which is likely to be based

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<sup>92</sup> See section B, 1.

<sup>93</sup> Art 8.

<sup>94</sup> However, it is questionable whether the applicant should be able to select any court, or whether they should be limited to a jurisdiction which is foreseeable.

<sup>95</sup> Art 22.

<sup>96</sup> Art 22(1).

<sup>97</sup> Art 22(2) and see 22(3).

<sup>98</sup> Arts 23-25. See also Recital 47, which seeks to facilitate the informed choice of the parties to ensure legal certainty and better access to justice.

<sup>99</sup> Art 26(1) and (2).



on at least one of the parties' habitual residence at the time of the divorce.<sup>100</sup> To resolve this either spouse may ask the authority having jurisdiction to apply an alternative law, such as the latest common habitual residence of the spouses if they lived in that jurisdiction for significantly longer than the time lived in their first marital habitual residence.<sup>101</sup> The parties do not have the opportunity to designate the law of the forum<sup>102</sup> (although they can designate a forum to match with the law, but they would need to work out which law was applicable first). The provisions on applicable law focus very much on party autonomy. The choice of law provision is flexible and well-drafted. Parties should take the opportunity to designate an applicable law, if possible, because the law otherwise applicable appears less persuasive. In contrast the provision on choice of court is relatively weak, and it only applies in certain situations. Party autonomy can still be invoked in relation to Article 8 for those who are well-informed, but the unpicking of these rules is a minefield for litigants who do not have access to specialist legal advice.

#### **4. Conclusion**

This section shows that the instruments can lead to different jurisdictions being available, and laws being applied, in related proceedings. This lack of co-ordination and fragmentation of proceedings is not helpful for individuals who are seeking to end their marriage. Even in cases where they agree that their dispute should be dealt with by a particular court, they will need a good lawyer who can advise them appropriately on the intricacies of the various provisions. Where jurisdiction is split across different Member States then they may need to consult different lawyers for their substantive dispute, which will increase costs. If the litigants are unable to consult a lawyer and are acting in person they will face further difficulties, due to the complicated rules. Even where some of the proceedings are separated within a Member State, it will still be simpler for parties if all issues can be dealt with in one Member State and they can combine issues that can be combined. The separation is not particularly helpful for judges because if the national law requires certain elements to be combined it will not be possible for judges to comply with the national law where EU law has separated the issues,<sup>103</sup> by attributing jurisdiction to different Member States. It also shows that jurisdiction and law cannot be separated because in many situations the jurisdiction

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<sup>100</sup> In the alternative it will be based on the joint nationality of the parties.

<sup>101</sup> Art 26(3).

<sup>102</sup> In contrast see Art 5 Rome III, and Art 7 Hague Protocol.

<sup>103</sup> *PM v AH*, *supra* n 6.

will affect the law, depending on whether the harmonised rules apply in the court with jurisdiction.<sup>104</sup>

### **C. Is there a clear policy behind these different approaches?**

Section B has demonstrated that each instrument takes a different approach to party autonomy, and although it is possible to arrange for the issues to be dealt with in one Member State, it will not always be easy to achieve this. Harding suggests that this atomisation of family law across different instruments made it easier to achieve consensus on each issue in isolation, and the texts represent the most suitable connecting factors for each stage in the process.<sup>105</sup> However, this does not explain discrepancies within instruments, which do not always work towards the general policy of the instrument, such as the attempt to protect the weaker party in maintenance.<sup>106</sup> The ease of gaining consensus at a political level is not sufficient to subject families to this quagmire of rules, when the breakdown of their family is already extremely difficult for them. The accompanying documentation does not clarify why these differing approaches were taken,<sup>107</sup> and any reference made to party autonomy is brief. Maultzsch indicates that it “seems plausible that these differences are not the result of deliberate regulatory decisions by the European legislator but rather the result of different points and contexts of enactment of the respective instruments.”<sup>108</sup> Examples which suggest that there was not a deliberate decision based on theoretical issues are: why is it acceptable to prorogate a court for parental responsibility but not for child maintenance and why there is a broad principle of submission for maintenance with no warning system to protect creditors? Indeed different groups of experts and practitioners have worked on these instruments, and it is likely that they simply had different views. This supports Maultzsch’s theory that there were no deliberate regulatory decisions. However, it is argued that this approach is not suitable and instead the EU

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<sup>104</sup> For example a choice, or seising in relation to Art 3 Brussels IIa, of an English court is also a choice of English law, across all areas. Whereas in Sweden the seising of the divorce court will result in the application of Swedish law for divorce and parental responsibility but potentially a different law for maintenance. In contrast the seising of the French court for divorce will not necessarily result in the application of French law, due to the impact of Rome III.

<sup>105</sup> M Harding, “The harmonisation of private international law in Europe: taking the character out of family law?” (2011) 7 *Journal of Private International Law* 203, 221.

<sup>106</sup> See Walker, *supra* n 3, 773-4.

<sup>107</sup> Where this is available, such as: the Borrás Report, Hague Explanatory Reports, documents from Hague Special Commissions.

<sup>108</sup> Maultzsch, *supra* n 45, 474.

should attempt to make deliberate decisions based on the specific characteristics of family law. This should form a central theme which these regulatory decisions are based on in the future. This paper will now consider the problems with excluding joint party autonomy from specific areas and identify whether there is a clear policy reason for the exclusion.

It is unclear why there is no specific provision for choice of court agreements in the context of divorce. The Borrás Report states that the (extremely) minor role for free choice “is logical... since the issue is matrimonial proceedings.”<sup>109</sup> No further explanation is given. It may be necessary to control jurisdiction for divorce as marriage is a matter of primary status. However, there is a difference between prohibiting choice and allowing a completely free choice. In certain cases the ability to designate a connected court may create a greater link with the divorce than some of the options currently available.<sup>110</sup> The inability to designate a particular court, or invoke party autonomy by using a provision on qualified submission, could be particularly problematic for certain parties in the context of divorce. Although the multiple alternative fora could be argued to support individual party autonomy by giving a variety of options,<sup>111</sup> the options may not always be suitable for the dispute. Each Member State has different rules on divorce which could affect access to court. If a particular jurisdiction requires a period of separation before divorce, or if the system is fault-based, it may be that the applicant cannot pursue a divorce in their chosen jurisdiction if they are the one at fault according to the substantive law on divorce.<sup>112</sup> This may be affected by Rome III where applicable. In the absence of choice of law, this would mean that the law of the forum would only apply where there has been no common habitual residence in the 12 months prior to the seising of the court, or there is no common nationality.<sup>113</sup>

Another area in which choice of court may be pertinent is in relation to marriages that are not accepted in all Member States, such as same-sex marriage. It is helpful to allow parties to choose a different court, if the courts otherwise available are in jurisdictions that do not recognise same-

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<sup>109</sup> Borrás Report, para 31.

<sup>110</sup> See section E, 1 (b). See also Hodson who states: “The potential difficulties in Art 3 arise for the international family with simultaneous, parallel connections in more than one country. They find themselves being shoe-horned into legal categories which have no or little bearing on the reality of the lives of international families. The various indents may accord with legal concepts but they do not accord with modern international lives.” (D Hodson, “What is jurisdiction for divorce in the EU? The contradictory law and practice around Europe” (2014) *International Family Law* 170, 170).

<sup>111</sup> Ní Shúilleabháin, *supra* n 12.

<sup>112</sup> See for example Ní Shúilleabháin, *supra* n 15, para 4.16.

<sup>113</sup> See Art 8, and section B, 3 above for choice of law.

sex marriage and therefore this would mean the parties would be unable to get a divorce.<sup>114</sup> Countries that refuse to recognise same-sex marriage are unlikely to issue a divorce under a foreign law on grounds of public policy. However, a decision of the United Nations Human Rights Committee on the International Covenant on Civil and Political Rights indicates that States will no longer be able to refuse same-sex spouses (who are validly married abroad) access to divorce, where the law creates remedies for other marriages that are not in themselves recognised in that State (such as polygamous marriages).<sup>115</sup> In cases where parties are unable to seek an effective remedy, the ability to choose a court at the time the proceedings are brought, so akin to the prorogation proceedings in relation to the child, would be very helpful. The provision, in Article 3(1)(a) indent 4 Brussels IIa, which gives some space for joint party preference only works where one of the parties is habitually resident in a Member State that allows for joint applications. The ability to make a choice of court agreement in relation to divorce could increase legal certainty, rather than giving the litigants the option of seemingly multiple alternative fora, which may actually be impeded by the applicable national law.

The decision to exclude choice of court agreements in relation to child support applications was drawn from the 2007 Hague Convention (finalised about a year before the Regulation, but the instruments were negotiated at similar times).<sup>116</sup> Unfortunately it is not clear from the preparatory documents why the decision was taken to exclude child support from the indirect rule relating to choice of court agreements. The early draft text does not make an exception for children in relation to choice of court agreements, thus permitting choice of court agreements for all applications.<sup>117</sup> The available comments on this draft<sup>118</sup> do not raise any concern in relation to the provision applying to children. However the next draft of the 2007 Convention includes the exception

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<sup>114</sup> Although the negative effect of this is slowly reducing as more States recognise same-sex marriage.

<sup>115</sup> Human Rights Committee, Communication No 2216/2012, CCPR/C/119/D/2216/2012, 3<sup>rd</sup> August 2017. The HRC considered that Australia had violated Art 26 of the International Covenant on Civil and Political Rights for treating same-sex marriages, validly entered into abroad, differently from polygamous marriages, voluntarily entered into abroad, by providing access to divorce in one situation but not the other. This resulted in differential treatment on the basis of sexual orientation and access to divorce must also be provided for validly married same-sex couples.

<sup>116</sup> See P Beaumont, "International Family Law in Europe — the Maintenance Project, the Hague Conference and the EC: A Triumph of Reverse Subsidiarity" (2009) 73 *Rechts Zeitschrift* 509.

<sup>117</sup> Preliminary Document No 16 of October 2005, Tentative draft Convention on the international recovery of child support and other forms of family maintenance, Art 16(e). (Prepared by the Drafting Committee).

<sup>118</sup> Preliminary Document No 21 of June 2006, Issues arising under the tentative draft Convention on the international recovery of child support and other forms of family maintenance (prepared by the Permanent Bureau of the Hague Conference) and Preliminary Document No 23 of June 2006, Comments on the tentative draft Convention (Comments from Member States).

relating to children.<sup>119</sup> Preliminary Document No 26, which relates to this draft, does not provide an explanation either.<sup>120</sup> It does state, however, that consideration should be given to whether vulnerable adults should also be excluded from the provision.<sup>121</sup> This suggests there was some concern that children could be considered as vulnerable therefore choice of court agreements should not apply to them, but there is no clear explanation of why this approach was taken in either the preliminary documents or the Explanatory Report.<sup>122</sup> Some guidance may be taken from the Bonomi Report,<sup>123</sup> on the accompanying Protocol to the Convention, in relation to choice of law. According to the Report the choice of applicable law was excluded for maintenance obligations towards minors because the potential risks seemed to outweigh the benefits. It was considered that the choice would involve a risk of conflicts of interests because the minor is usually represented by one of their parents.<sup>124</sup> This is not very convincing. Why is this distinguished from spouses choosing the applicable law, surely, they also have different interests at stake on the breakdown of their relationship. Further in the case of child support, should both parents not be trying to support their child suitably?<sup>125</sup> To suggest otherwise infers that the conflict arises because one spouse does not want to support their child,<sup>126</sup> or else there should not be a conflict. Competent adults make decisions all the time that are not exclusively about their own interests,<sup>127</sup> so why are they not permitted to do so in this context? It is unclear whether the decisions relating to applicable law impacted directly on the removal of the choice in relation to jurisdiction, but the arguments do not appear particularly convincing in relation to jurisdiction or law.

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<sup>119</sup> Preliminary Document No 25 of January 2007, Preliminary draft Convention on the international recovery of child support and other forms of family maintenance, Art 17(e). (drawn up by the Drafting Committee under the authority of the Special Commission on the International Recovery of Child Support and other Forms of Family Maintenance).

<sup>120</sup> Preliminary Document No 26 of January 2007, Observations of the Drafting Committee on the text of the preliminary draft Convention (prepared by the Drafting Committee).

<sup>121</sup> *Ibid*, 6.

<sup>122</sup> Degeling and Borrás Report, paras 455-457, 163, available at <https://www.hcch.net/en/publications-and-studies/details4/?pid=4909> accessed on 25 July 2018.

<sup>123</sup> Explanatory Report on the Hague Protocol on Applicable Law, available at <https://www.hcch.net/en/publications-and-studies/details4/?pid=4898> accessed 25 July 2018.

<sup>124</sup> Bonomi Report, para 128.

<sup>125</sup> See section D, 2 below.

<sup>126</sup> Of course, there will be some people that purposefully try to defy the law, but no option implies that this is the approach of the majority.

<sup>127</sup> A Diduck, "Autonomy and vulnerability in family law: the missing link" in J Wallbank and J Herring (eds) *Vulnerabilities, Care and Family Law* (Ashgate, 2013) 95, 100; S Andrews et al "Promotion of child maintenance: research on instigating behaviour change volume I: main report", (2011 CMEC Research Report No. 1, London: Child Maintenance and Enforcement Commission) 41.

The lack of co-ordination demonstrates that there is an unclear theoretical underpinning and that the policy considerations taken into account were not clear and did not follow from one document to the other. Although the issues covered are different, the policy approaches taken do not apply logically across or even within instruments. Universal assumptions about autonomy, as set out in the Maintenance Regulation<sup>128</sup> and Hague Protocol,<sup>129</sup> can be problematic. It is clear that there is no reason to completely exclude joint party autonomy from any of these areas. Therefore a framework for joint party autonomy should be developed across each area taking account of the specific characteristics of family law. The section below will now discuss the role of party autonomy in both substantive and procedural family law, to see what lessons can be learned from national approaches.

#### **D. Peculiarities and specific characteristics of family law**

In order to determine the extent to which party autonomy is appropriate in family law, it is necessary to consider family law in the context of the specific characteristics that pertain to it, which are not apparent in contract law, such as the relational and emotional context. Family law is about intimate connections and relations, based on long-term (often infinite) commitments to spouses, children and elderly parents. In particular, the focus should be on interdependence which arises from caring relationships.<sup>130</sup> This interdependence can restrict an individual's ability to act autonomously,<sup>131</sup> therefore it is important to consider these issues to identify when autonomy can be exercised. These specific issues need to be thought about in relation to procedural family law, and not simply confined to the substantive dispute. "Procedure is an instrument of power that can in a very practical sense, generate or undermine substantive rights."<sup>132</sup> Therefore it is important to take account of these issues, and national approaches to substantive autonomy, when determining what approach to take to party autonomy in private international law. The issues in play also have wider relevance beyond private international law and can relate to other procedural questions, such

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<sup>128</sup> See for example Rühl, *supra* n 48.

<sup>129</sup> Art 8(3) prohibits all "vulnerable" adults from reaching an agreement on applicable law, regardless of the context of the relationship in question.

<sup>130</sup> M Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press, 2005).

<sup>131</sup> *Ibid.*

<sup>132</sup> T O Main, "The Procedural Foundation of Substantive Law" (2010) 85 *Washington University Law Review* 801, 802.

as whether to opt for arbitration (or another form of ADR).<sup>133</sup> The same concerns remain pertinent and as we will see, similar issues arise.

### 1. *Public private divide*

In the past marriage and divorce were seen as matters of State concern,<sup>134</sup> and to some extent they still are in order to protect marriage as a primary status and enforce the public commitments of a marriage.<sup>135</sup> However, States are becoming much more lenient in relation to family law and traditional State interests are not as important anymore.<sup>136</sup> Despite the fact that family law has changed immensely, allowing for more autonomy and now recognising different family structures and relations,<sup>137</sup> in conflicts of laws these matters are still broadly seen as a State concern.<sup>138</sup> McLaughlin also notes similar tensions between party autonomy and the State's goal to further public policy in divorce laws in relation to pre-nuptial agreements and choice of law clauses.<sup>139</sup> This has raised complex questions on the portability of marital agreements and choice of law clauses, with there being little uniformity of judicial approach across State lines.

At worst party autonomy in private international law could be considered as “actors trying to suspend the validity of State law and replace it with their own law.”<sup>140</sup> However, in countries where the policy encourages families to make their own private agreements on relationship breakdown,<sup>141</sup> the parties do not have to comply with the law when making these agreements, they

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<sup>133</sup> Some of the issues considered may also have significance for the cross-border recognition of family agreements. See <https://www.hcch.net/en/projects/legislative-projects/recognition-and-enforcement-of-agreements>, accessed 28 March 2018.

<sup>134</sup> S Shakargy, “Marriage by the State or Married to the State? Choice of Law in Marriage and Divorce” (2013) 9 *Journal of Private International Law* 499, 501.

<sup>135</sup> Harding, *supra* n 105, 226.

<sup>136</sup> Shakargy, *supra* n 134, 501; A Diduck, “Autonomy and Family Justice” (2016) 28 *Child and Family Law Quarterly* 133.

<sup>137</sup> J Carruthers, “Party Autonomy in the Legal Regulation of Adult Relationships: What Place for Party Choice in Private International Law?” (2012) 61 *International and Comparative Law Quarterly* 881; Shakargy, *supra* n 133.

<sup>138</sup> Lehmann argues that one has to determine what conflicts of laws is about before deciding whether party autonomy should be permitted. If the subject is based on State interests then he considers that party autonomy should not be permitted. M Lehmann, “Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws” (2008) 41 *Vanderbilt Journal of Transnational Law* 381.

<sup>139</sup> J McLaughlin, “Premarital Agreements and Choice of Law: One, Two, Three, Baby, You and Me” (2007) 72 *Missouri Law Review* 793.

<sup>140</sup> F Rodl, “Private Law beyond the democratic order – on the Legitimatory Problem of Private Law beyond the state” (2008) 56 *American Journal of Comparative Law* 743, 765.

<sup>141</sup> Mediation is popular in Member States such as France, Belgium, Spain, Italy, England and Ireland, and becoming more prevalent in other States (R Lamont, “Mediation in EU Cross border Family Law” in P Beaumont et al (eds) *Cross Border Litigation in Europe* (Hart, 2017) 787).

just need to reach an agreement that works for them. In England commentators have gone so far as to say that some elements of family law could now be regarded as personal preference rather than a legal obligation due to the withdrawal of State support and the strive for family agreements.<sup>142</sup> In some countries the only time parties need to involve the legal system is for the divorce itself,<sup>143</sup> and even then it can be a half-hearted attempt to uphold the law if the divorce is uncontested. If the parties choose not to get divorced and just separate informally then they can do whatever they wish and the legal system will only become involved if the parties disagree further down the line and initiate proceedings, or if there are child welfare concerns. Likewise if the couple have been cohabiting and were not married, then they do not need to go to court on relationship breakdown if they can resolve their issues independently. This is not to say that these national systems are perfect, or that private agreements can work for everyone. However, the strict approach taken to party autonomy in private international law (in certain circumstances) does not appear justified when national laws and policies on private agreements demonstrate a reduction in State concern in private family matters.

## ***2. Specific issues: structural power imbalance exacerbated by unknown future outcomes***

Family relationships are about cooperation, altruism and solidarity. The law needs to appreciate the special quality of intimate relationships and take these considerations into account when providing for party autonomy. Undertaking an open-ended responsibility (and commitment) “for another is not likely to be found in non-intimate relationships, as it is so disconnected from self-interest; being responsible for another is an unqualified commitment which is difficult to conceive as something which ever instrumentally serves the interest of the one undertaking the commitment.”<sup>144</sup> In this intimate relationship people begin to make decisions on the basis of the working through of their relationship, and this process is by its nature affected and influenced by

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<sup>142</sup> See for example G Douglas, “Towards an understanding of the basis of obligation and commitment in family law” (2016) 36 *Legal Studies* 1, 12.

<sup>143</sup> In contrast some laws even allow for private divorces. However, private divorces (and potentially other private actions) do not fall within the EU applicable law rules. See the Opinion of AG Saugmandsgaard Øe in C-372/16, *Soha Sahyouni v Raja Mamisch*, followed by the CJEU, EU:C:2017:988.

<sup>144</sup> J Wightman, “Intimate relationships, relational contract theory, and the reach of contract” (2000) 8 *Feminist Legal Studies* 93, 112.



the surrounding emotions, relationships and resources.<sup>145</sup> Within this special relationship and commitment family law also has a gendered dimension.<sup>146</sup> As such a contractual view to party autonomy in family law is problematic because it is associated with a presumption that agreements are entered into by two independent gender-neutral individuals, both seeking to safeguard their property and finances.<sup>147</sup> This is not the case in family law due to the interdependence of family relationships.

Party autonomy in its broadest sense assumes the free will of the parties. The nature of family relationships makes individual autonomy problematic because these relationships tend to be based on interdependence, trust and care rather than independence.<sup>148</sup> This paper argues for joint party autonomy based on this interdependence. Some commentators have coined this interdependence as relational autonomy.<sup>149</sup> In order for joint party autonomy to work effectively each party to the marriage must feel empowered to make that choice,<sup>150</sup> rather than simply agreeing to follow a choice which is only made by one of the parties. Unfortunately, relationality and power imbalances mean that parties will not always be able to act autonomously in the way they wish. Fineman argues that because of the strength of dependency created by caring, autonomy is a myth in family relations.<sup>151</sup> In addition, because autonomy is often modelled on independence and self-sufficiency then this does not promote equality. If anything, it furthers inequality because it does not take account of the realities of mothering within the family.<sup>152</sup> Therefore, a model which presumes all decisions are autonomous and upholds individuals to earlier decisions on this basis is problematic. “Using notions of individual choice or responsibility as justification for existing conditions fails to recognise that quite often a choice carries with it consequences not anticipated or imagined at

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<sup>145</sup> J Herring, “Relational Autonomy and Family Law” in J Wallbank et al (eds) *Rights, Gender and Family Law* (Abingdon, Routledge, 2010) 257, 266-268.

<sup>146</sup> See Diduck, *supra* n 136; S Thompson, *Prenuptial agreements and the presumption of free choice: issues of power and theory in practice* (Hart, 2015) and EU Commission 2017 Report on equality between men and women in the EU [https://eeas.europa.eu/sites/eeas/files/2017\\_report\\_equality\\_women\\_men\\_in\\_the\\_eu\\_en.pdf](https://eeas.europa.eu/sites/eeas/files/2017_report_equality_women_men_in_the_eu_en.pdf), which shows that women in the EU are more likely to work part-time, or have less secure jobs, than men.

<sup>147</sup> Thompson, *ibid*, 6, and see S Ouazzani, “Prenuptial agreements: the implications of gender” (2013) *Family Law* 421.

<sup>148</sup> See for example, J Eekelaar, “Self-restraint: Social norms, individualism and the family” (2012) 13 *Theoretical Inquiries in Law* 75; C Smart *Personal Life* (Polity Press, 2007); M Verkerk, “The care perspective and autonomy” (2001) 4 *Medical Health Care Philosophy* 289.

<sup>149</sup> See for example, Nedelsky, *supra* n 11; C MacKenzie and N Stoljar (eds) *Relational Autonomy* (OUP, 2000).

<sup>150</sup> Nedelsky, *supra* n 11; Herring, *supra* n 11.

<sup>151</sup> Fineman, *supra* n 130.

<sup>152</sup> *Ibid*, 183.

the time of the initial decision.”<sup>153</sup> However, a model which presumes individuals can never make their own decisions within an interdependent relationship is also problematic. Instead a suitable framework must be found that accounts for compassion, caretaking and structural imbalances. When identifying this framework particular consideration needs to be paid to when autonomy can best be exercised.

Research demonstrates that party autonomy can be used to take advantage of “weak parties”,<sup>154</sup> therefore safeguards are necessary to ensure the parties are indeed “autonomous”. These safeguards must take account of the extent to which power imbalances affect party autonomy. However, this requires a consideration of whether power imbalances mean some parties are inherently “weaker”; and if so does this mean that these parties cannot be autonomous, or do we just have to create a mechanism which supports real autonomy? Kroll-Ludwigs questions whether “weaker parties” can be identified as weaker parties at a general level, arguing that there are no structural but only situational imbalances of power.<sup>155</sup> This is questionable. This is not just because of the particular relationships in family law but because of the structural gender inequalities, in relation to work and child rearing,<sup>156</sup> which are prevalent in many States. Thompson argues that these inequalities were evident in her study on New York pre-nuptial agreements which found that the person requesting the pre-nuptial agreement is in a stronger position and this inequality appeared in almost every case.<sup>157</sup> Although this was not always linked to gender,<sup>158</sup> it usually was, and the person who is forced to sign the agreement will most likely be the maintenance creditor on relationship breakdown (usually, but not always the woman). Consequently it might be fair to accept that some cases are situational, they all have their own facts, but in most cases the inequality on the breakdown of family relationships is structural not situational.<sup>159</sup> The structural imbalances identified do not render autonomy impossible, we cannot presume vulnerability and that specific

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<sup>153</sup> *Ibid*, 226. See also Friedman, *supra* n 10.

<sup>154</sup> S Symeonides, “The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments” (2013) 61 *American Journal of Comparative Law* 873, 878.

<sup>155</sup> K Kroll-Ludwigs, *Die Rolle der Parteiautonomie im europäischen Kollisionsrecht* (Tübingen, Mohr Siebeck, 2013) 483-6 as cited by Maultsch, *supra* n 45, 485 n 85.

<sup>156</sup> See for example, Diduck, *supra* n 136, 133; Lamont, *supra* n 141. Fineman notes that it is the caretaking itself that is inherently disadvantageous while recognising that caretaking is gendered (Fineman, *supra* n 130).

<sup>157</sup> Thompson, *supra* n 146, 90, and see more generally pp 80-90. Baroness Hale also identifies this problem in *Radmacher (formerly Granatino) v Granatino* [2010] UKSC 42.

<sup>158</sup> See for example *Radmacher, ibid*, where the wife was trying to protect her family wealth, and Thompson, *supra* n 146, 172.

<sup>159</sup> See for example P Laufer-Ukeles, “Selective recognition of gender difference in family law: Revaluing the caretaker role” (2008) 31 *Harvard Journal of Law and Gender* 1.

categories of people cannot be autonomous,<sup>160</sup> but the approach taken to autonomy has to be developed in a way that does not ignore these inequalities.

One method of addressing these inequalities is through the timing of the agreement. Where the parties have entered into an agreement prior to their marriage or divorce, whether the agreement is substantive or procedural, there are unknown factors (such as how many children the parties will have, the extent this will affect work progression, where the parties will live and where the family home will be) at the time the agreement is reached. In relation to substantive agreements Thompson notes that because the circumstances are unknown, “the notion of contractual autonomy is even more flawed, because the spouse with less bargaining power and who is on the short end of the agreement, cannot predict what the effect of contracting out of his entitlement on divorce will be.”<sup>161</sup> There are undoubtedly similar consequences when parties are choosing between jurisdictions and applicable laws (or a law is pre-decided as a result of a choice of court clause) where the laws diverge in their approach to divorce and its consequences. These are key issues which need to be considered on relationship breakdown.<sup>162</sup> In the context of prior agreements even if parties are given proper legal advice at the time the agreement is made, and there are limited structural imbalances at that time,<sup>163</sup> this may still not be particularly valuable as the legal advice can only pertain to the current situation and the choice of jurisdictions (and laws) available at that time. These jurisdictions (and laws) might be very different to those available at the time of relationship breakdown.<sup>164</sup> In contrast an agreement made at the time of relationship breakdown can take account of the situation at that time and the legal advice can reflect that. Holding parties to their prior choice represents an ethic of justice.<sup>165</sup> It promotes justice because it is based on legal certainty. However it is questionable whether it is just to hold parties to such an agreement, when it is debatable whether they acted autonomously at that time, because they lacked the knowledge

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<sup>160</sup> Diduck, *supra* n 136, 147; J Nedelsky, *supra* n 11.

<sup>161</sup> Thompson, *supra* n 146, 7. In addition, the requirement to obtain legal advice will not mean an agreement is fair, and some parties sign agreements even where they are advised to the contrary (Thompson, *supra* n 146, 87).

<sup>162</sup> See for example *AH v PH (Scandinavian Marriage Settlement)* [2014] 2 FLR 251 where a prenuptial agreement was not enforced by the English court, partly, because the terms did not make sense in light of the family’s living arrangements at the time of the hearing.

<sup>163</sup> The EU Commission gender equality report shows that these imbalances are often evident, *supra* n 146.

<sup>164</sup> Under the Maintenance Regulation habitual residence at the time of the agreement could be totally different from habitual residence at the time of breakdown, which is thereby creating another choice which wasn’t available at the time any legal advice may have been provided. See section B, 2.

<sup>165</sup> Herring, *supra* n 11, 36-37.

necessary to make their decision. Further, if one party no longer wishes to be held to the agreement, there is nothing they can do if the other party seizes that court first.

A model which reserves choice for the time of relationship breakdown is more consistent with an ethic of care. Entering into an agreement at this time should allow individuals to make decisions based on their current family life at that time, which takes into account the consequences of their marriage. It is also less susceptible to imbalances of power, caused, for example, by a refusal to marry if an agreement is not entered into, beliefs prior to the marriage that the marriage will last forever, so the agreement will not be important, or that the agreement, whether procedural or substantive, will not be invoked if the marriage does break down.<sup>166</sup> All these issues impinge on our capacity to make a truly autonomous decision before and during a relationship. However, at the time a relationship ends, the exercise of autonomy should be easier for parties.<sup>167</sup>

## **E. New approach**

Taking the problems with the fragmentation in the current approach into account, this paper will now argue for a new approach to party autonomy which is consistent across and within the instruments and is based on the concepts of interdependence and caring. The approach should be based on joint party autonomy with the aim of making life easier for families, on relationship breakdown, where they agree on a particular court.<sup>168</sup> It should bring more coherence into EU family law and will make it easier for the EU to develop one instrument on family law in the future.

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<sup>166</sup> “Sometimes I can see it in their eyes, they think, I have to sign it to get married and that’s sometimes true and I know I’ll convince them to tear it up, or he’ll change or something and my experience is that’s not what happens.” (Thompson, *supra* n 146, 87).

<sup>167</sup> In cases where there is domestic violence the concerns about autonomy (and safety) continue beyond the end of the relationship. This paper does not have the space to consider cases involving domestic violence in any significant detail. However, it is noted that some commentators believe that it is incorrect to automatically assume that *all* domestic violence victims will be unable to act autonomously (Nedelsy, *supra* n 11; Diduck, *supra* n 136, and see n 159) but it is acknowledged that these cases have their own specific circumstances. In all cases it is up to the judge to try and determine whether the parties are truly agreeing to the jurisdiction, see section E, 1 for more details. For further information about power imbalances, domestic violence and ADR see for example N Semple, “Mandatory Family Mediation and the Settlement Mission: A Feminist Critique (2012) 24 *Canadian Journal of Women and the Law* 207.

<sup>168</sup> These considerations can also apply to other procedural decisions such as whether to use an arbitrator or another form of ADR. Decisions on which method of dispute resolution to use should also be reserved for the time of the proceedings for the same reasons.

This section will argue that choice of court agreements should be permitted at the time of the proceedings and the connection required should be more flexible than in the current instruments.

## **1. *The timing of the choice and other relevant limits on choice***

### *(a) The timing of the choice and problems with a discretionary approach*

Choice of court should be reserved for the time that proceedings are brought to court.<sup>169</sup> Some may argue that this approach is very strict and narrow, however, in practice it should not create a problem for parties who actually agree which court should hear their dispute at the time of relationship breakdown. This approach avoids the problem of limping choices and means parties are not bound by an earlier choice which one party no longer finds acceptable now they are not constrained by the beliefs they held at the start of, or during, the relationship.<sup>170</sup> A choice made at the time of relationship breakdown is also more consistent with an ethic of care and an increased power of autonomy due to knowledge, power and self-conscious thought<sup>171</sup> in relation to the choices available at that time and the positions of the litigants. A new provision will be based on Article 12 of Brussels IIa, but it will allow for a wider choice, and can also be thought of as a protected submission to an appropriate court. This will empower parties and support joint party autonomy because the parties will either have to agree on the court just before the proceedings are brought, or at the start of the proceedings.

Section D(2) above shows why power imbalances can be particularly problematic at the beginning of a relationship, and how this links to procedural agreements as well as substantive agreements. Despite this pre-nuptial agreements are still accepted in some jurisdictions,<sup>172</sup> and in some contexts, but this is not a sufficient reason to accept prior choice of court agreements. In English law pre-nuptial agreements are subject to a substantive assessment by the court, based on fairness. In Scotland a court can set aside an agreement where it is not fair and reasonable at the time the agreement was entered into.<sup>173</sup> This is different to the assessment carried out by the

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<sup>169</sup> Currently there is no room for joint party autonomy in the context of divorce. See section B above.

<sup>170</sup> Section D.

<sup>171</sup> Nedelsky considers that this connection to oneself is essential for proper autonomy (Nedelsky, *supra* n 11, 135-6).

<sup>172</sup> For a comparative discussion see J Scherpe (ed) *Marital Agreements and Private Autonomy in Comparative Perspective* (Hart, 2012).

<sup>173</sup> Family Law (Scotland) Act 1985, s16(1)(b) and see *Bradley v Bradley* [2017] SAC Civ 29.

English court in the sense that these agreements are acceptable in Scotland unless it is proved they are not fair, whereas the English court considers agreements as just one factor to take into account.<sup>174</sup> In New York pre-nuptial agreements will only be set aside if they are unconscionable, however the meaning is narrowly construed and enforcement is stringent even in cases where the agreement is not fair.<sup>175</sup> The assessments available at the time of divorce vary greatly but they do exist. A substantive fairness assessment does not apply to choice of law or choice of court agreements, in the EU Regulations, which are only considered in a procedural manner. An example of a substantive assessment for jurisdiction, in the context of EU Regulations, in relation to reasonableness can be found in relation to the discussion of Article 7 of the Maintenance Regulation in *B v B*.<sup>176</sup> For Articles 12 and 15 of Brussels IIa there is meant to be a procedural rather than substantive assessment of the best interests of the child. Further in these instances the judge is looking at the situation at that point in time, in light of real connections, rather than assessing the fairness of an agreement on jurisdiction or law from 5, 15 or 30 years earlier.<sup>177</sup> Therefore, an assessment of whether it is fair to invoke a prior choice of court, or law agreement, at the time of relationship breakdown is impractical under the current system. It also seems unlikely that a court would set aside an agreement simply because one party argues that they do not want the agreement to apply due to a change in circumstances.

In cases where there has not been a significant lapse of time, Ní Shúilleabháin argues that it is difficult to justify the non-enforcement of a choice of court agreement that has been entered into voluntarily (with the aid of legal advice) and the parties have nominated a connected court.<sup>178</sup> Although this argument has weight, practically it creates some difficulties. In particular what is meant by a significant lapse of time, and when will a lapse of time be considered significant in relation to a particular relationship. A significant change which affects the connection of the designated court could happen within two years or there could be no significant change within 10 years, even though there is a greater lapse of time. The other question is how this should be

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<sup>174</sup> *Radmacher, supra* n 156; *Z v Z (No 2)(Financial Remedy: Marriage Contract)* [2012] 1FLR 1100; *B v S (Financial Remedy: Matrimonial Property Regime)* [2012] 2 FLR 502; *AH v PH (Scandinavian Marriage Settlement)* [2014] 2 FLR 251.

<sup>175</sup> Thompson, *supra* n 146, 94, and 89. For an assessment of the usefulness of this test in cases where parties have made sacrifices during the marriage see 93.

<sup>176</sup> *B v B* [2014] EWHC 4857 (Fam).

<sup>177</sup> See the current rules discussed above at section B.

<sup>178</sup> Ní Shúilleabháin, *supra* n 15, para 4.11.

confirmed. Ní Shúilleabháin suggests that judges should have the discretion to refuse the jurisdiction agreement, because it is impossible to cater for changed circumstances and unfair bargaining when fixed rules are imposed.<sup>179</sup> This approach is consistent with an ethic of care if the rules are applied appropriately. However, research has shown that some judges are reluctant to refuse to enforce substantive private agreements, even where there are changed circumstances and there was unfair bargaining, and instead favour legal certainty and clear rules.<sup>180</sup> There is also the problem that the broad discretionary approach to agreements decided prior to marriage, such as purported in *Radmacher*, is a very English approach to family law where the judges have a wide range of discretion in family matters. This is different to the approach taken in many other Member States to agreements made during or prior to the marriage.<sup>181</sup> Further a lack of clarity as to whether a judge will enforce your agreement or not could lead to more uncertainty and be unhelpful. A survey of cases, in America, on choice of law in premarital disputes demonstrated an “erratic and unpredictable judicial approach, providing little guidance to practitioners, their clients and sister courts.”<sup>182</sup> The best way of ensuring fairness and supporting joint party autonomy in family proceedings is to reserve choice for the time of the proceedings. In cases where the requirements for choice of court are not fulfilled then the other relevant rules will apply instead.<sup>183</sup>

*(b) Limits on the choice available*

The other consideration is whether the choice of court should be limited to certain connected jurisdictions or be left completely open. One option would be to allow the parties to choose any court without the need for a connection, like the submission provisions do. A positive element of this approach is that it can create certainty. Kruger and Samyn argue that “a weaker party is [not] protected by limiting the number of choices available. Real protection is dependent on a system that ensures free choice, ie that neither of the parties was coerced nor coaxed into the choice.”<sup>184</sup> Symeonides also focusses on protecting actual autonomy, arguing that it does not matter how much a system “promotes party autonomy, but rather on how clearly and fairly it delineates its

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<sup>179</sup> *Ibid*, para 4.14. See also Carruthers, *supra* n 137, 909, who argues for a case-by-case approach to party autonomy in family law, relying on *Radmacher*, which also suggests an exercise of discretion (see also 911).

<sup>180</sup> Thompson, *supra* n 146.

<sup>181</sup> See for example Scherpe (ed) *supra* n 172.

<sup>182</sup> McLaughlin, *supra* n 139, 821.

<sup>183</sup> See for example, *PM v AH*, *supra* n 6.

<sup>184</sup> T Kruger and L Samyn, “Brussels II bis: successes and suggested improvements” (2016) 12 *Journal of Private International Law* 132, 145.

parameters and on whether it provides the necessary safeguards to ensure the parties are indeed autonomous.”<sup>185</sup> In contrast others like Ní Shúilleabháin and Carruthers argue that there needs to be a link between the court chosen and the marriage,<sup>186</sup> and therefore limitation on freedom is necessary.<sup>187</sup> A completely open choice does not protect marriage as a primary status. Therefore, some limits on choice might be necessary to ensure the provision is acceptable.<sup>188</sup> It is important that any limitation protects party autonomy and supports joint autonomy by taking the special characteristics of family law into account. The solution will also have to be acceptable for Governments as legislation in this area requires unanimity in the Council of the EU.

Choice should not be limited just to the court of habitual residence of the parties, or their domicile or nationality, because this may be available anyway. Instead the choice should at least be open to any EU Member State<sup>189</sup> that has a sufficient connection to the family. Requiring that there is a “sufficient connection” may create some uncertainty due to the potential for inconsistent interpretation across States. However due to the peculiarities of individual families’ situations this flexibility will be a positive factor. It will allow the court to assess, on the basis of the facts of the case, whether it is a suitable court to hear this case and whether the judge believes the parties are in fact acting autonomously. Without being too specific a recital could give a broad list of factors which could constitute a sufficient connection (such as the habitual residence, former habitual residence, nationality or citizenship of *one* of the parties, or the place of marriage) whilst specifying that the list is non-exhaustive. Any provision which is too prescriptive would defeat the object of introducing flexibility to account for individual circumstances. This would also be more convincing than the current approach where jurisdiction has to be found in certain situations which create harsh results. For example in the case of a couple who have lived all their life in Brazil, but both have dual Portuguese nationality acquired from their grandparents heritage, one party could

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<sup>185</sup> Symeonides, *supra* n 154, 878.

<sup>186</sup> Ní Shúilleabháin, *supra* n 15, para 4.11; Carruthers, *supra* n 137, 912.

<sup>187</sup> See for example Carruthers, *ibid*, 912.

<sup>188</sup> Divorce is the only area where no form of submission is permitted, which may be related to the perceived need to protect marriage as a primary status.

<sup>189</sup> This is the most sensible approach because in any event the EU Regulation cannot control what happens in non-Member States, and in family law choice of court agreements do not have a special priority over the other jurisdictional rules, the *lis pendens* provisions apply in the same manner regardless of whether there is a choice of court agreement (Art 12 Maintenance Reg). (In contrast see Art 31(2) of Brussels Ia (reversing Case C-70/09 *Alexander Hengartner and Rudolf Gasser v Landesregierung Vorarlberg* EU:C:2010:430) for exclusive choice of court agreements in a civil and commercial context).



petition in Portugal although there is no real connection.<sup>190</sup> In contrast two Scots who have lived in an EU Member State, such as Belgium, for 16 years and then move to France will not be able to petition for divorce in Belgium under Brussels IIa even though they have a substantial connection to Belgium.<sup>191</sup> These harsh results do not provide a suitable solution for either couple.

The ability to prorogate a court of the parties' choosing that has a sufficient connection to the relationship will create greater flexibility in cases where the parties can agree on a suitable forum. There may also be a closer connection to the forum of choice than the forum which is already available in relation to certain relationships. Therefore, it is more realistic to take an approach which is more flexible on selection, and there is evidence that it will be acceptable to participating States. Article 12 Brussels IIa shows that States are prepared to accept a wider forum choice, even where the child itself does not have a particular link to the jurisdiction, but there is agreement and a connection, in accordance with the text in Article 12. In intra-EU cases Article 12 has been used to establish jurisdiction for parental responsibility claims in the case of divorce instead of the habitual residence of the child.<sup>192</sup> The provision has also been used in more complicated situations.<sup>193</sup> Article 12 has also been used in cases where the child is not habitually resident in the EU. In *Re I* jurisdiction was found over a child who lived in Pakistan with his grandparents, but the parents were habitually resident in the UK.<sup>194</sup> If Member States can accept jurisdiction over children not habitually resident in the EU, then why can they not accept wider choice of court rules for divorce. The new approach leaves space for judges to reject jurisdiction in cases where they do not think there is a suitable connection, which can appease any public policy concerns. The need for a connection would support an argument that any related proceedings could be dealt with by the same court,<sup>195</sup> and that the parties could designate the *lex fori*.<sup>196</sup> If no connection is required then this may pose difficulties for parental responsibility, and applicable law, which would lead to further fragmentation of the rules.

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<sup>190</sup> See Ni Shúilleabháin, *supra* n 15, para 4.66, see also 5.46.

<sup>191</sup> Under the current rules they would need to either petition in Scotland, or in the State of their new habitual residence(s).

<sup>192</sup> *Re S (Brussels IIR: Prorogation)* [2013] EWHC 647 (Fam).

<sup>193</sup> *L v M*, *supra* n 31.

<sup>194</sup> *Re I (A child) (Contact Application: Jurisdiction)* [2009] UKSC 10.

<sup>195</sup> See Art 12 Brussels IIa.

<sup>196</sup> Parties can choose to get married anywhere in the world, there are no restrictions. However, the formal validity of that marriage is determined by a connected law. Torremans (ed) *Cheshire, North and Fawcett: Private International Law* (15<sup>th</sup> edn, 2017, OUP) 891.

(c) *Applicable Law*

Requiring that there is some form of connection can also prevent parties from being subject to calculated choices of forum and law.<sup>197</sup> If the forum must have a connection to the family, then it would be logical to allow parties to select the law of the forum,<sup>198</sup> which will not be an unrelated law.<sup>199</sup> Current applicable law rules indicate that States are willing to accept a designation of the *lex fori*<sup>200</sup> at the time of the commencement of proceedings,<sup>201</sup> therefore this should be acceptable given the need for a connection which should appease public policy concerns. This is also compatible with the CJEU decision in *KP v LO*, where the court emphasised that the general acceptance of the application of the *lex fori* in the Hague Protocol is based on the premise that there is a connection between the jurisdiction and the dispute.<sup>202</sup> Therefore, according to this decision, the jurisdiction must be foreseeable in order for the *lex fori* to apply. However it should be noted that Article 7 of the Hague Protocol allows the parties to designate the *lex fori* even where one party has selected an unconnected court using Article 5 of the Maintenance Regulation. One benefit of Article 7 of the Hague Protocol is that it is based on joint party autonomy so it avoids the automatic application of an otherwise unconnected law. Despite this anomaly it is still arguable that where the parties have designated an unconnected court, at the time of the proceedings, it will be harder to justify the application of law of the forum because that jurisdiction is not foreseeable. If the alternative solution is that States are willing to accept prorogation of any court, but they then seek to protect regulatory interests by limiting choice of law in such cases, this will not necessarily assist with simplifying the situation and could lead to further fragmentation and confusion.

In cases where parties do not want to select forum law, then they should be subject to the otherwise applicable law rules, whether under Rome III (and other harmonised provisions) or

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<sup>197</sup> See Symeonides, *supra* n 154, 888.

<sup>198</sup> See Art 7 Hague Protocol.

<sup>199</sup> However, Carruthers argues that choice would have to be made from a finite list of legal systems (Carruthers, *supra* n 137, 912).

<sup>200</sup> Art 7 Hague Protocol and Art 5(1)(d) Rome III.

<sup>201</sup> Mautzsch argues for a floating choice of *lex fori* (Mautzsch, *supra* n 45, 483). One benefit of this is that it increases certainty as it is clear that the law of the forum will always apply, and there is no need to plead foreign law. Although there are some benefits to this approach, it is questionable how helpful this will be if parties have no idea what that forum will actually be. It may also encourage a rush to court if parties know that forum law will apply regardless of which court they choose.

<sup>202</sup> *Supra* n 82, paras 46 and 49.

national law.<sup>203</sup> The current approach which requires a specific connection,<sup>204</sup> where choice of court or law is permitted,<sup>205</sup> is not feasible going forward because the rules do not always create a relevant link, they are inflexible, result in limping choices and they lead to fragmentation. Therefore taking account of all the issues together, a practical solution, which should assist with the different problems including resolving fragmentation, showing greater respect for party autonomy, and protecting the weaker party, is to allow parties to seise a court with a connection to the dispute at the time that the dispute comes to a head.

*(d) Conclusion*

The above analysis demonstrates that safeguards in relation to prior choice would be difficult to establish and difficult to apply, and there is no guarantee that a court with a current legal connection to the case will hear the case. As such the insistence to limit advance agreements to particular jurisdictions remains questionable, and these prior agreements may not reflect the parties' needs and circumstances at the time of separation. A discretionary approach, in relation to prior choice, will not be easy to apply in all Member States, and could either mean that the judges favour certainty, or there is a complete lack of certainty. The approach proposed in this article helps to provide clarification in the sense that as long as the parties agree at the time the court is seised,<sup>206</sup> then the court should accept the jurisdiction as the court first seised, unless the parties do not have a sufficient connection to the Member State of the court. This is similar to the current Article 12 Brussels IIa, but the court will have to check that there is a connection rather than checking the choice is in the best interests of the child, for the purpose of the divorce. A procedural check for the best interests of the child would remain for parental responsibility. The priority should be supporting party autonomy at the time of the court proceedings, with the safeguard that a completely unconnected court is not selected without being overly prescriptive about the connection necessary to allow for individual family circumstances. This will allow parties to work together to designate a choice which works for them, and they will not be restricted by the current provisions which can lead to harsh outcomes.<sup>207</sup>

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<sup>203</sup> See section B, 3 above.

<sup>204</sup> Rather than a true connection to the particular case.

<sup>205</sup> See for example the Maintenance Regulation and Rome III.

<sup>206</sup> See section E, 2 below on safeguards to ensure that there is an agreement.

<sup>207</sup> See section B and E, 1(b).

## 2. *Measures to ensure the parties agree*

Having rejected alternative approaches, it is important to consider how this approach would work in practice. This needs to take account of different forms of procedures and consider how to determine whether the parties agree, and whether there is a sufficient connection in these procedures. The other issue is the timing of the choice and how this relates to current practice. Currently under Article 12 Brussels IIa the jurisdiction must have been accepted at the time the court is seised. A court is considered as seised at the time when a document instituting the proceedings, or an equivalent document, is lodged with the court, or served upon the defendant.<sup>208</sup> This means that the parties must be able to demonstrate that an agreement was reached between the relevant parties at the time when the document instituting the proceedings is lodged with the chosen court.<sup>209</sup> In an application for divorce, adult maintenance or matrimonial property the relevant parties would be the spouses, and in applications involving children the relevant parties would also include other holders of parental responsibility. This would reflect the language in Article 12(1) Brussels IIa, rather than Article 12(3), to avoid the situation in *Saponaro* where a public prosecutor who was made a party under national procedural law was considered to be a party under Article 12(3).<sup>210</sup> In many cases, however, it will be up to one party to file the proceedings, which means that the question of whether there was an agreement can only be tested at a later point in time. It is argued below, that the current approach to the timing in Article 12 Brussels IIa can work, even though the confirmation or test will come later.<sup>211</sup>

### *(a) Administrative systems*

With the rise of litigants in person in England and Wales, the court application forms have become more detailed, and they are also accompanied by guidance notes so that individuals can complete the forms on their own.<sup>212</sup> Therefore countries that have procedural, or semi-procedural, systems for divorce should ensure that standard forms are used to check that parties are accepting the

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<sup>208</sup> Art 16.

<sup>209</sup> *L v M*, *supra* n 31, para 56.

<sup>210</sup> *Saponaro v Xylina*, *supra* n 26, and see section B, 1.

<sup>211</sup> For example in cases involving Art 12, whether or not there is unequivocal acceptance can only be tested at the time of the proceedings, even though it should have been apparent at the time the court is seised.

<sup>212</sup> See for example <http://formfinder.hmctsformfinder.justice.gov.uk/d8-eng.pdf> and <https://www.gov.uk/looking-after-children-divorce/apply-for-court-order> both accessed on 25 July 2018.

jurisdiction. If jurisdiction is based on prorogation, this would have to be clearly accepted on the form. The form could state:

It is advised that you seek legal advice before confirming that you accept the jurisdiction. The acceptance of this jurisdiction could have knock on effects in relation to applicable law and jurisdiction in other areas. If you do confirm that you accept this jurisdiction, you will not be able to appeal this at a later date,<sup>213</sup> so please seek independent legal advice at this stage. If you decide not to accept the jurisdiction, then you are free to bring a divorce application in another jurisdiction of your choice in accordance with the relevant legal rules.

In the forms the applicant would also have to explain what the connection to the jurisdiction is, and the respondent would have to confirm this, within a relevant period of time, such as 2 months from the date the form was served. If it is decided that further information is needed then a hearing could take place in relation to jurisdiction.<sup>214</sup> Once jurisdiction is confirmed if the divorce is undefended it can be finalised in the normal way.

#### *(b) Court proceedings*

In Member States where there are court proceedings, and forms must be completed before proceedings are instituted, the initial forms should be similar. At this initial stage the court forms for making an application for divorce (or other issue as relevant) should also suggest that the parties seek legal advice on the effects of acceptance and highlight connected implications. In jurisdictions where no forms (or paperwork) have to be completed at all, some information should be available through lawyers and on the documents that are served to the parties (to try and ensure that the parties receive some information in advance of the hearing). At the hearing the judge should be required to ask the parties whether they accept the jurisdiction. When doing this the judge should confirm that the parties have received legal advice and if they have not, the judge should ask whether either party wants to postpone the hearing to seek this advice. When asking the parties about postponement the judge should alert the parties to the fact that if they do not postpone and they accept the jurisdiction, then they will no longer be able to change their mind in regards to

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<sup>213</sup> This would be subject to review by the authorities if the parties acted in a fraudulent manner (*In the Matter of 180 Divorces: Rapisarda v Colladon* [2014] EWFC 35; *Moynihan v Moynihan (No 2)* [1997] 1 FLR 59).

<sup>214</sup> *Marinos v Marinos* [2007] EWCH 2047 (Fam); *Tan v Choy* [2015] 1 FLR 492; *Peng v Chai* [2015] EWCA Civ 1312.

jurisdiction.<sup>215</sup> This test, at the time of the commencement of court proceedings, would allow the judge to determine whether there is a free choice. However if one of the parties does decide to postpone this would then prevent acceptance at the time the court was seised, and instead result in a qualified submission, if the party did accept the jurisdiction after gaining legal advice. Therefore there would also need to be a provision on qualified submission, similar to the one in the Matrimonial Property Regulation.<sup>216</sup> In the context of divorce such a provision may require that the defendant has knowingly submitted to the jurisdiction of a connected court, rather than any court.<sup>217</sup> In cases where the parties choose not to postpone and the judge does not have good reason to believe that the parties are not acting autonomously, then it can be considered that the jurisdiction was accepted at the time the court was seised. If the parties are aware that these steps will be taken then it is more likely that they will have discussed jurisdiction and have a true agreement before bringing proceedings in that jurisdiction. Those who are invested in playing the system will do this anyway, and parties are more than capable of wasting assets and increasing costs in national as well as international proceedings if they are that way inclined.<sup>218</sup> With this in mind it is better to legislate for the majority, who would like their divorce and any connected proceedings resolved as simply as possible, most likely in one country,<sup>219</sup> than to take specific measures for the small minority that apply to the many.

## F. Conclusion

The approach to party autonomy in EU family law should focus on the specific characteristics of families, such as dependence and caring. This will make the rules on party autonomy more

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<sup>215</sup> Carruthers has concerns that increased party autonomy will “generate satellite litigation on topics such as the existence, validity and enforceability of agreement, contractual capacity and informed consent.” (Carruthers, *supra* n 137, 913). However, if a judge follows these procedures, and only assumes jurisdiction where both parties before him seemingly agree then this type of litigation should not be of concern. If parties choose not to seek legal advice when this is suggested, then it is their autonomous decision not to consult a solicitor. If the judge has serious concerns about the capacity of one of the parties then that judge does not have to accept the prorogation.

<sup>216</sup> The unqualified submission provision in the Maintenance Regulation is not acceptable, and there is no equivalent for divorce, so this would also help to bring some consistency into this area in relation to submission.

<sup>217</sup> See section E, 1(b) and (c).

<sup>218</sup> See for example *Joy-Moranco v Joy* [2017] EWHC 2086 (Fam) para 3; *JS v RS* [2017] EWCA Civ 408 paras 117-20; *Chai v Peng* [2017] EWHC 792 (Fam) paras 1-4.

<sup>219</sup> The aim is to make life easier for the parties who want this. If some parties want to split their proceedings between different courts, then they will still be able to do this, by choosing a court in some instances or using the default rules, as applicable.

convincing and it will lead to more consistency and coherence across the instruments. The approach recommended for party autonomy is based on Article 12 Brussels IIa. Choice of court should be reserved for the time the proceedings are brought, to allow for the sacrifices and interdependency attributed to caring relationships. This approach is based on an ethic of care. It should also allow parties to designate a court with a sufficient connection to the case, which is broader than Article 12(1) Brussels IIa. The benefits of this are: the parties should be able to select a court that they think has a close link to their marriage, the court designated should have a sufficient connection to the parties at the relevant time, parties can ensure proceedings are heard within one State, and the parties should also be able to select forum law because the law will have a connection to the relationship. It is acknowledged that some commentators may consider that this approach is too narrow, however it is arguably an improvement on the current divorce regime. The current divorce regime leaves no space for joint party autonomy and the jurisdictions available could lead to odd results in certain cases.

Currently, the Maintenance Regulation and the Matrimonial Property Regulation do provide some flexibility through the submission provisions. However, these provisions do not necessarily promote discussions and agreement between the parties prior to the initiation of the proceedings, because they are drafted in a way which allows one party to act alone. In contrast Article 12 of Brussels IIa appears to promote discussion prior to the seising of the court. Therefore, this should be the best method of promoting joint party autonomy. While the qualified submission provision in the Matrimonial Property Regulation might not promote discussion prior to the initiation of proceedings, it is recognised that it should protect against pure individual party autonomy because the defendant still has the chance to refuse to submit to the jurisdiction after being given legal advice on the effects of submission. A potential concern with this provision, however, is that it allows the applicant to seise any court and that jurisdiction could be unforeseeable. All the other provisions currently available, including unqualified submission, can be seen as promoting individual party autonomy and failing to protect weaker parties. Therefore, a provision based on Article 12 Brussels IIa, which applies to divorce, maintenance and matrimonial property could promote joint party autonomy across all areas of EU family law and make life simpler for families on relationship breakdown.

